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In the
Supreme Court of the United States

WESLEY A. SHAFER, *PETITIONER*,

v.

SOUTH CAROLINA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Whether *Simmons v. South Carolina*, 512 U.S. 154 (1994), entitled petitioner to a jury charge or closing argument that a life sentence would be without parole, when, at the time of his closing argument and the jury charge, under state law life without parole was not the only available alternative sentence to death?

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CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina is reported as *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000), and is reprinted in the Joint Appendix at 254-78. Also relevant is *State v. Starnes*, 531 S.E.2d 907 (2000). *Starnes* is the companion case to *Shafer* which decided the same issue pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), and to which the *Shafer* opinion refers in addressing the *Simmons* issue.

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on May 8th, 2000. This Court's jurisdiction is invoked by the Petitioner pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

2. Section 16-3-20 of the Code of Laws of South Carolina, which is reprinted in the Appendix to the Brief of Petitioner App. 1 through App. 8.

RESPONDENT'S STATEMENT OF THE CASE

A. Procedural History

Petitioner, Wesley Aaron Shafer, Jr., is presently confined in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Union County. In May 1997, the Union County Grand Jury indicted Petitioner Wesley Aaron Shafer for murder, attempted armed robbery and conspiracy. Specifically, the murder indictment alleged that, on April 13, 1997, Petitioner shot Ray Broome in the head with malice aforethought. The state made notice of intent to seek the death penalty, and served notice of evidence in aggravation.

Judge John C. Hayes conducted a jury trial in Union County beginning on January 12, 1998. On January 18, 1998, the trial jury convicted Petitioner of all charges.

The sentencing hearing began the next day. After presentation of the evidence, the trial judge charged the following statutory aggravating factor:

> A murder was committed while in the commission of an attempted armed robbery while armed with a deadly weapon.

The judge charged the following statutory mitigating circumstances:

> 1. The defendant has no significant history of a prior criminal conviction involving the use of violence against another person.

> 2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> 3. The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirement of the law was substantially impaired.
>
> 4. The age and mentality of the defendant at the time of the crime.

The judge also instructed the jury that it could consider non-statutory mitigating circumstances supported by the evidence.

On January 21, 1998, the jury found the aggravating circumstance and recommended that Petitioner be sentenced to death for the murder. The trial judge imposed the death sentence the same day, along with consecutive sentences of twenty and five years for the attempted armed robbery and conspiracy charges respectively.

Petitioner timely filed notice of appeal. In the direct appeal to the South Carolina Supreme Court, Petitioner was represented by David I. Bruck, Esquire. Assistant Attorney General S. Creighton Waters, Esquire, represented Respondent. Both parties filed briefs in the appeal, and the following issues were presented by Petitioner:

> I. The trial court's incomplete and misleading response to the jury's question about parole eligibility renders his death sentence fundamentally unfair.

II. The trial court's refusal to allow Petitioner to present evidence to rebut the prosecution's argument concerning the supposed general deterrent effect of the death penalty, together with the denial of a curative instruction, denied Petitioner due process of law.

III. The trial court erred in granting the state's request for a blanket prohibition of all religious or biblical references during defense counsel's sentencing phase closing arguments.

The South Carolina Supreme Court heard oral argument on October 7th, 1999, and the court issued its opinion affirming Petitioner's conviction and sentence on May 8th, 2000. *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000). On May 24th, 2000, Attorney Bruck filed on behalf of Petitioner a "Consent Motion for Stay of Execution". The South Carolina Supreme Court on June 6th, 2000 granted the motion for stay of execution but denied Petitioner's motion to stay the Remittitur. The Remittitur was sent down on June 6th, 2000.

Petitioner filed his Petition for Writ of Certiorari with the United States Supreme Court on July 14th, 2000, and this Petition was docketed on July 20th, 2000. This Court granted the Petition for Writ of Certiorari on September 26th, 2000.

B. Statement of the Evidence Presented at Trial

Although the defense did argue against the presence of malice at trial, it is undisputed that Petitioner Wesley Shafer killed Ray Broome by shooting him twice in the head. The issues in this appeal only challenge the sentencing phase. The following briefly describes the evidence presented at trial.

Adam Mullinax, Shafer's cousin and a co-defendant, spent most of Saturday, April 12th, 1997, with Shafer and Justin Porter. R. 1161, 1154-1159. Mullinax testified that Shafer, who was wearing a Duke University jacket, showed off a pistol he kept in the jacket's outside pocket. R. 1159- 1161. At about 7 p.m., Mullinax left Porter and Shafer and went to watch boxing. R. 1159, 1162-1163.

Later that Saturday night, a number of teenagers and young adults were "cruising" in the parking lot at the Hot Spot convenience store, a popular late-night hangout in Lockhart, South Carolina. R. 990; 1017-1018; 1024-1025. Ray Broome, the victim, was the third shift clerk at the Hot Spot. R. 941. Around 11:30 p.m., two men in a brown late-70's Ford pickup attracted attention by spinning the truck's wheels at the gas pumps. Jamie Gibson, who was hanging out at the Hot Spot, recognized Justin Porter as the driver. The passenger, who Gibson did not know, was wearing a Duke University hooded jacket. After Porter and his passenger went in the store, those hanging out at the Hot Spot saw the two men again spin the truck's wheels while leaving. As the truck pulled away from the store, the passenger held his arm out of the window and fired several shots into the air with a handgun. R. 962, 990-996, 1011-1013, 1020, 1025-1026, 1039-1040, 1045, 1047-1048.

At about midnight, Mullinax again met up with Porter and Shafer, and after the three drank a few beers, they decided to go to the Hot Spot for cigarettes. Upon arrival, Mullinax used the restroom in the store and returned outside to the Ford pickup. Shafer then pulled the hood on his head, and he and Porter entered the store around at about 1:00 a.m. R. 996-1000, 1013; 1162-1168.

What happened next was entirely captured on a video recorders hooked to the Hot Spot's security cameras. The

videotape introduced at trial reflects Shafer walk in and shoot Broome in the head with a startling lack of warning. Eight seconds later, Shafer strolled over to the counter, leaned over it, and at close range put another bullet into Broome's head as he lay on the floor. After attempting and failing to open the cash register, Shafer and Porter ran out the door. JA 14; R. 963-965, 1168-1170.

Once back at the truck, Shafer jumped in the middle of the seat and ducked his head down on Mullinax's lap. While standing at the truck's door, Porter pulled a hat onto his head, fumbled around looking for the keys, and then started the truck and drove away. R. 1028-1031, 1041-1043, 1048, 1170-1171.

Meanwhile, Jamie Palmer, Monica Inman, and Jennifer Martin had pulled into the Hot Spot parking lot in time to watch Shafer and Porter run to the truck and escape. Although her friends were apprehensive, Palmer went inside the Hot Spot and found Broome lying on the floor behind the counter. She promptly dialed 911. While she was on the phone, her friends came inside and begged her to leave, saying, "They might come back, they might come back." JA 14-15; R. 965, 1028-1032. Although Broome was still breathing when law enforcement and EMS arrived, emergency room personnel could not save him. R. 941-943, 975 -976, 1503-1506, 1507-1508, 1511.

After escaping from the Hot Spot, Shafer, Porter, and Mullinax returned to Porter's house. While Shafer was confident they would not be caught, he stated they need to get rid of their clothes. Shafer and Porter wrapped the murder weapon, which belonged to Shafer's father, in Mullinax's shirt and hid it under the seat in an old car behind the barn. The two then weighted Shafer's Duke University jacket with a rock, and put it into a nearby creek with their shirts and hats stuffed in the pockets. R. 1171-1174, 1108-110, 1130-1136.

The girlfriend of one of the responding deputies was the cousin of Porter, and she and Jamie Palmer had a conversation the night of the incident. R. 977-979. As a result of this conversation, the police drove Palmer and Inman by Porter's house Sunday morning. The young women identified the Ford pickup parked in Porter's yard as the one involved in the incident. R. 979 -980, 984-987, 1033-1037, 1053-1059.

The trail inevitably led to Shafer, and he was arrested that day. R. 1059-1073, 1079 -1102. After initially denying knowledge of the gun's whereabouts, Shafer ultimately told officers where it was hidden. He also directed them to the location of the hidden jacket and a box of bullets. R. 1104-1105, 1108-1110, 1118, 1121, 1124-1125. When asked by law enforcement why he shot Broome, Shafer replied that he had the gun and "just snapped." R. 1120, 1122, 1125-1126.

During the sentencing phase, the state introduced evidence that on October 9th, 1995, Shafer pled guilty to criminal sexual conduct with a minor 2nd and burglary 2nd. Shafer was part of a group of guys who broke into an empty mobile home and pressured, but did not force, two 12-year old girls to engage in sexual activity with them. Shafer did not always comply with the terms and conditions of his probation and home detention from that incident. JA 32-43. During that time he tested positive for marijuana, had another burglary 2nd charge, and was charged with driving under suspension and operating an uninsured vehicle. JA 70-73, 78.

While in jail awaiting trial, prison staff caught Shafer with contraband, including a green leafy substance as well as cigarettes and a lighter. JA 45-51, 65-70. Shafer also was charged with simple assault after he angrily confronted a prison guard who turned off the outside phones at the end of recreation period. JA 52-65.

Robert Newton, who was in county jail with Shafer, testified that when Shafer told him about shooting Broome he did not seem bothered by it. According to Newton, Shafer said that when Broome saw Shafer pointing the gun at him, he just looked back down at a clipboard. Shafer took this as a "smart comment", and fired the pistol. JA 81-85.

The state also presented testimony from various emergency personnel about the unsuccessful efforts to save Broome and the emotional ordeal of informing his family. R. 1502-1514. Broome's wife and son also testified about their loss. R. 1551-1576.

In mitigation, Shafer presented relatives and neighbors who generally testified about mental and physical abuse Shafer and his sister suffered at the hands of their father, Ricky. R. 1577-1609, 1650-1680, 1789-1808, 1850-1861. Dr. Patrick Goldsmith, a psychologist, testified about Shafer's alleged abuse, substance use, and resulting impulse control problems. He diagnosed Shafer with depression, and felt there was a "probability" he suffered post traumatic stress disorder in early childhood. JA 90-122.

Also testifying for Shafer was Lt. Col. David Grossman, who has a master's degree in psychology and who is the self-anointed founder of the discipline of "killology". Grossman theorized that years of abuse, watching violent movies, and playing violent video games had conditioned Shafer much in the "stimulus-response" manner which the military uses to train soldiers to kill the enemy. Thus, he generally asserted that Shafer had a "conditioned response" where if a "target" such as Ray Broome presented himself, it would be "extraordinarily difficult" for Shafer not to shoot. JA 123-158; R. 1681-1786.

In reply, the state presented testimony about one of the video games played by Shafer and discussed by Grossman. The witness stated that although a player got points by shooting bad guys, the player lost a life if he shot the "innocent townsfolk." R. 1865-1870.

C. Presentation and resolution of the federal issue at trial

At trial, the state sought an *in limine* motion that parole ineligibility could not be mentioned in either the charge or defense argument because the state had not triggered *Simmons v. South Carolina* by making future dangerousness an issue. *See, e.g. State v. Southerland*, 447 S.E.2d 862 (S.C. 1994) (holding that *Simmons* was not triggered because the solicitor did not argue future dangerousness). Defense counsel responded that the state could not use evidence about Petitioner's character and prior record without also raising future dangerousness. The court found that as of yet, future dangerousness had not been argued, so he granted the state's motion. JA 160-64.

Next, the defense expressed its generic desire for the court to charge South Carolina's murder statute, S.C. Code § 16-3-20, "as applicable." After the court indicated that it was charging what it thought was applicable from the murder statute, the defense made a motion to read from section 16-3-20. JA 164-65. The defense evidently wanted to read the following portion of section 16-3-20:

> For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits,

> education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

JA 270. The court denied this motion. The state and the defense *both* agreed that the judge should charge the jury the portion of the statutory definition that life imprisonment means "until death of the offender." JA 166-69.

After the solicitor's sentencing phase closing argument, the defense argued that the solicitor raised future dangerousness when he echoed the statement of one of the witnesses who found the victim in trying to get her friend to leave, by saying "they might come back, they might come back." The solicitor stated he was merely arguing general deterrence, and the court agreed. JA 188-92.

The trial court then charged the jury as follows:

> THE COURT: I tell you that life imprisonment means until death of the defendant.
>
> * * *
>
> In deciding whether to sentence the defendant to death or life imprisonment, I remind you that death means just what it says, death. Life imprisonment means incarceration of the defendant until his death.

JA 201-09.

Finally, during deliberation the jury sent a note to the judge asking the following two questions:

> (1) Is there any remote chance for someone convicted of murder to become eligible for parole?
>
> (2) Under what conditions would someone convicted for murder be eligible?

JA 222, 253. The state again argued that under the *Simmons v. South Carolina* and its progeny, parole ineligibility does not need to be charged even if someone is parole ineligible, unless future dangerousness is argued. Thus, the state asserted that the court was bound by the state law rule in *State v. Norris*, 328 S.E.2d 339 (S.C. 1985). *Norris* provides that upon a jury's question about parole eligibility, the trial court should charge (1) that parole eligibility should not be considered, and (2) that death and life imprisonment should be considered in their plain and ordinary meaning. The state agreed to substituting "until death of the offender" for "plain and ordinary meaning" as the definition for life imprisonment. JA 222-28, 233-36.

In response, defense counsel admitted that the "until death of the offender" language was an appropriate "baseline," and stipulated that the second question could not be answered. The defense further contended that since section 16-3-20 explained that "life imprisonment" did not allow for parole or other early release programs, then the statute should be read to the jury. Asserting that under the present section 16-3-20 there are three clear options for the jury, the defense stated that it thought the jury should be charged that if they find an aggravator, Petitioner would receive life without parole. After the trial judge effectively ruled that it would charge *Norris*, Petitioner argued that the judge should not include "parole eligibility is not for your consideration" in its response to the jury's question. JA 224-26, 228-33, 234-39.

However, the judge ultimately charged the following:

> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this section life imprisonment means until the death of the offender, end quote.
>
> Parole eligibility *or ineligibility* is not for your consideration.

JA 239-40 (emphasis added).

D. The South Carolina Supreme Court's resolution of the federal issue on direct appeal

On direct appeal, the South Carolina Supreme Court addressed the due process claim for a parole ineligibility charge as follows:

> Appellant argues he was entitled to a charge on parole ineligibility after the solicitor placed his future dangerousness in issue. He contends Simmons mandates a parole ineligibility instruction and refusal to give the charge violated his right to due process. We disagree.
>
> When the State places the defendant's future dangerousness at issue and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury he is parole ineligible. [*Simmons v. South Carolina*]; *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996). Due process is violated when the State

> "raise[s] the specter of [the defendant's] future dangerousness generally, but then thwart[s] all efforts by [the defendant] to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." *Simmons*, 512 U.S. at 165 (plurality opinion).
>
> Appellant was tried under the new sentencing scheme which became effective on January 1, 1996. S.C. Code Ann. § 16-3-20 (Supp.1998). Under the new sentencing scheme, a defendant can be sentenced to (1) death, (2) life without the possibility of parole, or (3) a mandatory minimum thirty year sentence. We recently held *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, Op. No. 25[illegible]9 (S.C.Sup.Ct. filed May 8, 2000) (Shearouse Adv.Sh. No. 18 at 17). [FN7]
>
> [FN7] In *Starnes*, we suggested, under the terms of the statute, it is arguable that a defendant could be sentenced to more than thirty years and be eligible for parole after service of thirty years. For purposes of this discussion, we assume appellant was parole ineligible.

Accordingly, appellant's due process rights were not violated by the trial judge's refusal to instruct the jury appellant was parole ineligible.

Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the jury's sentencing recommendation is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is legally available to the defendant. *Simmons*, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole...".) (emphasis added). This interpretation is supported by decisions from other jurisdictions. *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir.1999) (*Simmons* is inapplicable if, at time of sentencing proceeding, defendant is parole eligible under state law; hence where judgment had yet to be entered for defendant's third murder conviction, defendant was parole eligible under "three strikes" law); *United States v. Flores*, 63 F.3d 1342 (5th Cir.1995), *cert. denied*, 519 U.S. 825, 117 S.Ct. 87, 136 L.Ed.2d 43 (1996) (because sentencing guidelines vest district court with discretion to adjust life sentence downward, life sentence without possibility of parole is not only legal sentence other than death which defendant might receive and, therefore *Simmons* is inapplicable);

Allridge v. Scott, 41 F.3d 213 (5th Cir.1994), *cert. denied*, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995) (*Simmons* applies where capital defendant is ineligible for parole as a matter of law; *Simmons* does not apply even if it is unlikely defendant would be paroled); *People v. Simpson*, 172 Ill.2d 117, 216 Ill.Dec. 671, 665 N.E.2d 1228 (Ill.), *cert. denied*, 519 U.S. 982, 117 S.Ct. 436, 136 L.Ed.2d 334 (1996) (*Simmons* inapplicable where capital defendant is statutorily eligible for a sentence less than natural life imprisonment); *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (N.C.1995), *cert. denied*, 516 U.S. 1133, 116 S.Ct. 956, 133 L.Ed.2d 879 (1996) (*Simmons* inapplicable where alternative to death is not life imprisonment without possibility of parole). At the time appellant's jury began its deliberations, three alternative sentences were available. Since one of these alternatives to death was not life without the possibility of parole, *Simmons* was inapplicable. [FN8]

[FN8] The dissent contends the cases cited herein are inapposite. Although the sentencing alternatives under consideration in each case referenced above may differ from those in South Carolina's new capital sentencing statute, each of the cases support the conclusion due process requires the jury be informed the capital defendant is parole ineligible where the only sentencing alternatives are death

or life without the possibility of parole and the prosecution argues the defendant's future dangerousness. Excepting *Flores*, in each of the cases cited above, the capital defendant was parole eligible, therefore, due process did not mandate the jury be informed the defendant was parole ineligible. In *Flores*, although parole ineligible, the federal district judge could have departed from the sentencing guidelines and imposed a sentence less than life imprisonment. Accordingly, due process did not require the jury be informed Flores was parole ineligible. As fully discussed in *State v. Starnes*, *supra*, because death and life without the possibility of parole are not the only sentence alternatives under the new sentencing statute, due process does not require the jury be informed the defendant is parole ineligible.

State v. Shafer, 531 S.E.2d 524, 527-28 (S.C. 2000); JA 257-62.

Shafer also addressed Petitioner's state law bases for his claim that after the jury's question the trial court should have charged Petitioner was parole ineligible. *Shafer* first reiterated that absent a *Simmons* issue, a jury's inquiry about parole should be handled with the "plain and ordinary meaning" charge from *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985). *Shafer*, 531

S.E.2d at 531, JA 267-68. The court reiterated that Petitioner could possible receive one of three possible sentences at the time of sentencing, and recognized that the jury's question meant it "was attempting to ascertain the length of time appellant would realistically spend in prison if sentenced to life imprisonment". *Id.*, JA 269. Thus, the court concluded:

> Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.

Id., JA 269.

Next, *Shafer* rejected Petitioner's claim that parole eligibility was suggested by the judge's charge, "parole eligibility or ineligibility is not for your consideration". The court noted that unlike the charge in *Simmons*, this instruction "specifically informed the jury not to consider either parole eligibility or ineligibility and, therefore, did not imply appellant was parole eligible". *Shafer*, 531 S.E.2d at 532, JA 269.

Finally, *Shafer* disagreed with Petitioner's contention that the jury should be read the portions of section 16-3-20 which define life imprisonment as not subject to parole or early release programs, because: (1) parole eligibility or ineligibility were not proper considerations for the jury, and (2) "the highlighted text provides the jury with only those portions Petitioner deems favorable but excludes any reference to other less favorable sentencing options". *Shafer*, 531 S.E.2d at 532. JA 269-71.

In *State v. Starnes*, the companion case to *Shafer*, the court discussed with more detail its rejection of a similar *Simmons* claim. *State v. Starnes*, 531 S.E.2d 907 (S.C. 2000). *Starnes* concluded that "the rationale for *Simmons* simply does not exist when there is a potential mandatory minimum thirty year sentence", because unlike a sentence of life without parole, "a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society". *Starnes*, 531 S.E.2d at 915-17.

Finally, *Starnes* rejected the claim that the jury, after just convicting the defendant of two murders, therefore necessarily was going to find the aggravating factor that "two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct". The court found it "inappropriate to assume the jury would find an aggravating circumstance" beyond a reasonable doubt, and thus concluded that "a potential mandatory minimum thirty year sentence existed" precluding the need for a parole ineligibility charge. *Id.* at 917.

SUMMARY OF THE ARGUMENT

The new South Carolina death penalty structure presents three options upon a conviction for murder: a mandatory minimum sentence of at least thirty years, a life sentence until the death of the offender and a death sentence. Since under South Carolina's new death penalty sentencing scheme there was legally available to Petitioner a definite term sentence as an alternative to death and life without parole, the South Carolina Supreme Court properly ruled that there was no triggering of the rule in *Simmons v. South Carolina*, 512 U.S. 154 (1994). When *Simmons v. South Carolina* was decided there was no finite term sentencing option available at the time the penalty phase jury instructions were given; indeed, there were no other sentencing alternatives

than a life sentence without parole or death. Now, there is a third option that exists at the time the jury receives its instructions.

In *Simmons*, the Court held that when the state argues future dangerousness and "the only available alternative sentence to the death penalty is life without parole," the jury was entitled to be told in instructions or argument that the life sentence would be without parole. Since in Petitioner's case life was not "the only available alternative sentence to the death penalty", *Simmons* does not mandate further instructions in the new South Carolina sentencing structure.

Since it was impossible to predict at the time of the jury charge and closing argument that the jury would make the necessary findings to preclude the possibility of a definite term sentence, then life without parole was not the only available alternative sentence to death, and a *Simmons* instruction was not required. In South Carolina, the narrowing decision is done during the penalty phase deliberations by the jury. As interpreted in *Ramdass v. Angelone*, 120 S.Ct. 2113 (2000), *Simmons* does not require trial judges in South Carolina to gauge the probability of future events in determining whether life without parole is the only available alternative sentence. The South Carolina Supreme Court's decision not to extend *Simmons* beyond the circumstances of that case was well founded where options including a definite term, parole under the definite term, the continuing possibility of pardon and other foreseeable and unforeseeable options for potential release existed at the time of the sentencing instructions.

Further, the rule of *Simmons* was satisfied by defense arguments that the Petitioner would be in jail for the rest of his life, and the trial judge's "until death of the offender" charge. This combination of argument and instructions made clear that the Petitioner would serve a life sentence until he died in the prison. Due process does not require more.

Finally, Simmons was not applicable because the prosecution did not argue future dangerousness as a reason to support a death sentence. The rule in *Simmons* is clear that the prosecution must raise future dangerousness as a condition precedent to the requirement of a *Simmons* instruction. Since the prosecution did not argue future dangerousness, the trial judge was not required to instruct under *Simmons*.

ARGUMENT

I. Since under South Carolina's death penalty sentencing scheme there was legally available to Petitioner a definite term sentence as an alternative to death and life without parole, the South Carolina Supreme Court properly ruled that the rule from *Simmons v. South Carolina* was not triggered.

This Court has repeatedly said that, subject to the due process rule of *Simmons*, states retain "some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case". *Ramdass v. Angelone*, 120 S.Ct. 2113, 2119 & 2121 (2000) (citing *O'Dell v. Netherland*, 521 U.S. 151 (1997). *See also Simmons v. South Carolina*, 512 U.S. 154, 176 (1994) (O'Connor, J., concurring) (citing *California v. Ramos*, 463 U.S. 992, 1013 n. 30 (1983)). The question in this case thus becomes whether the rule in *Simmons* was triggered under the sentencing scheme in place at the time of Petitioner's trial.

At the time of the sentencing jury's charge, there existed under state statutory law the possibility that Petitioner could have received as little as a 30-year mandatory minimum sentence based on the jury's findings. Because, therefore, life without parole was not the only alternative sentence to death, *Simmons* was not triggered, and due process did not require the trial judge to charge

the sentencing jury that Petitioner would get life without parole if the jury did not recommend death.

A. *Simmons v. South Carolina* and South Carolina's old sentencing scheme as compared to the sentencing scheme under which Petitioner was tried.

Previously, *Simmons* issues arose in the context of the old South Carolina penalty scheme for capital murder cases. Under the old law, if the jury found no aggravating factors in the penalty phase, the defendant received life in prison with a 20-year parole eligibility. If the jury found aggravating circumstances but did not recommend the death penalty, the defendant received life with a 30-year parole eligibility. Of course, the finding of aggravating circumstances would entitle the jury to recommend death for the offender. See S.C. Code Ann. § 16-3-20 (Supp. 1995).

In *Simmons* itself, the defendant pled guilty to a number of violent crimes prior to his death penalty trial. Therefore, regardless of whether the jury found aggravating circumstances, Simmons was ineligible for parole under South Carolina's section 24-21-640, because that section precludes parole for those with a second conviction for a violent crime defined under South Carolina Code section 16-1-60. *See* 512 U.S. at 156. The trial court prevented Simmons from mentioning parole during *voir dire*, and denied the defense's request for a life without parole charge. 512 U.S. 159-61. During closing, the solicitor argued future dangerousness as a justification for imposition of the death penalty on Simmons. 512 U.S. at 157, 176. After the jury inquired of the judge whether a life sentence carried the possibility of parole, the judge gave a charge that (1) death and life imprisonment should be considered in their plain and ordinary meaning, and (2) parole eligibility was not for the jury's

consideration. The jury then returned a death sentence. 512 U.S. at 160.

Simmons reversed the sentence, with the plurality reasoning that due process prevented the state from creating "a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171.

The present penalty scheme for capital murder is different from the one at issue when *Simmons* was decided. Under the present South Carolina Code section 16-2-30, if the jury in a capital case fails to find any aggravating circumstances, then the jury makes no sentencing recommendation, and the trial court has discretion to sentence the defendant anywhere from at least a mandatory minimum term of 30 years to life without parole. Pursuant to sections 24-13-100 and -125, no part of the finite term sentence can be reduced by parole.[1] If the murder defendant had at least one prior conviction of a "most serious offense," then the defendant **must** be sentenced to life without parole. S.C. Code Ann. § 17-25-45 (Supp. 1997). If the defendant has at least two prior convictions of a "serious offense," then solicitors in their discretion could seek a life without parole sentence. S.C. Code Ann. § 17-25-45 (Supp. 1997).[2] Although not eligible for parole,

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[1] In *Starnes*, the South Carolina Supreme Court opined that the language of section 16-3-20 made it "arguable [that] a defendant sentenced to more than thirty years [would be] eligible for parole after service of thirty years. 531 S.E.2d at 917 n. 17. *Cf.* S.C. Code Ann. § 16-3-20(A) (Supp. 1999) *with* S.C. Code Ann. 24-13-100 (Supp. 1999).

[2] A murder defendant sentenced to life without parole under section 17-25-45 could still be paroled for geriatric, health, or other extraordinary reasons. S.C. Code Ann. § 17-25-45(E) (Supp. 1997).

a person sentenced to life is still eligible for a pardon. S.C. Code Ann. §§ 24-21-920 to -1000 (1977 & Supp. 1999).

If, on the other hand, the jury finds aggravating circumstances but does not recommend a death sentence, then the trial court must sentence the defendant to life without parole. Of course, the jury can recommend a death sentence only if it finds aggravating factors. S.C. Code Ann. § 16-3-20 (Supp. 1997).

The jury during the sentencing phase of a South Carolina capital case is given all of its instructions at one time before retiring to deliberate, at the same time, on both the presence of aggravating factors and, if necessary, the punishment.

B. Triggering of the rule in *Simmons* requires that life without parole be the *only* available alternative sentence to death.

Simmons established a two-part test for triggering of its mandate:

> (1) the state must argue future dangerousness in the trial, and
>
> (2) "the only available alternative sentence to the death penalty is life without parole."

See Simmons, 512 U.S. at 169 (plurality uses "alternative sentence to death is life without parole" language in its statement of the holding); 512 U.S. at 177 (concurring opinion uses "only available alternative sentence to death" language).

Petitioner asserts that the "only available alternative to death" language in Justice O'Connor's concurring opinion is not the holding of *Simmons*, and argues that a *Simmons* instruction is

required whenever life without parole is merely one of the sentencing options. However, both the plurality in *Simmons* and *Ramdass* used or recognized the "alternative sentence" language. *Simmons*, 512 U.S. at 169 (plurality uses "alternative sentence to death is life without parole" language in its statement of the holding); 512 U.S. at 177 (concurring opinion uses "only available alternative sentence to death" language). *See also Ramdass*, 120 S.Ct. at 2120 (plurality cites with approval Justice O'Connor's "only available alternative sentence" language); 120 S.Ct. at 2126 (Justice O'Connor reiterates her "only available alternative sentence" language in the concurring *Ramdass* opinion). Indeed, even the *Ramdass* dissent used Justice O'Connor's "only available alternative sentence" language in its statement of the *Simmons* rule, 120 S.Ct. at 2135, and Justice O'Connor stated in *Ramdass*:

> In *Simmons v. South Carolina . . ., a majority of the Court held* that "where the State puts the defendant's future dangerousness at issue, and the only available alternative sentence to death is life imprisonment without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible".

Ramdass, 120 S.Ct. at 2126 (emphasis). *See also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (Justice O'Connor's concurring opinion in *Simmons* provided the dispositive votes necessary for the judgment); *Keel v. French*, 162 F.2d 263 (4th Cir. 1998) (recognizing Justice O'Connor's concurring opinion in *Simmons* as a statement of the case's holding).

Based on this language, South Carolina and other jurisdictions interpreting *Simmons* have held that it does not apply, even if the prosecutor argues future dangerousness, *unless*

the only other available alternative to a death sentence is life without the possibility of parole. *See Shafer*, 531 S.E.2d at 528; *State v. Byram*, 485 S.E.2d 360 (S.C. 1997); *State v. Simpson*, 479 S.E.2d 57 (S.C. 1996); *State v. Williams*, 468 S.E.2d 626 (S.C. 1996). *See also Kinnamon v. Scott*, 40 F.3d 731 (5th Cir. 1994) (not extending *Simmons* "beyond cases where the sentencing alternative is life without parole"); *People v. Simpson*, 665 N.E.2d 1228, 688 (Ill. 1996) ("*Simmons* addresses those situations where state law mandates that if the defendant is not sentenced to death, the only alternate sentence is natural life imprisonment); *State v. Chapman*, 464 S.E.2d 661 (N.C. 1995) (*Simmons* only applies where life without parole was the alternative to death); *State v. Loftin*, 680 A.2d 677, 714 (N.J. 1996) (rejecting claim to *Simmons* instruction because the state did not proffer future dangerousness as an aggravator and the only available alternative sentence to death was not life without parole); *Collier v. State*, 959 S.W.2d 621, 623-24 (Tex. Crim. App. 1997) (interpreting the *Simmons* test as requiring "the state [to put] the defendant's future dangerousness in free society in issue" and "the only available alternative sentence to death is life without parole"); *Mueller v. Murray*, 478 S.E.2d 542, 546-47 (Va. 1996) (stating that the *Simmons* instruction is required "where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life without parole"). *See also United States v. Flores*, 63 F.3d 1342, 1366-68 (5th Cir. 1995).

The rationale for the "only available alternative sentence" rule is obvious: there is no "false dilemma" from future dangerousness argument if the defendant's possible alternative sentences to death include a sentence from which the defendant would be released into society again. The fact that it is the "false dilemma" that drives the *Simmons* rule is further shown by both the plurality and concurring opinions' statement that the prosecution is free to argue without a life without parole charge

that the defendant will be a future danger in prison. *Simmons*, 512 U.S. at 165 n. 5; 512 U.S. at 177. There is no "false dilemma" from the lack of a "no parole" charge where the argument is that the defendant will be dangerous in the future to those he encounters within prison walls.

Thus, if there is an available alternative sentence to death other than life without parole, then *Simmons*'s rationale, and its rule, is not triggered.

C. If present as an alternative to death, either life with parole or a definite term sentence would preclude the necessity for a *Simmons* instruction.

The next step depends on making an analogy between a life sentence with the possibility of parole under the old South Carolina scheme (which was present in *Simmons*), and a definite mandatory minimum sentence under the new penalty scheme (which is present in this case). Such an analogy is appropriate.

As noted before, the concern in *Simmons* was that the solicitor had created a "false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. at 171. As held in *United States v. Flores*, 63 F.3d 1342, 1366-68 (5th Cir. 1995), it does not matter whether the "false dilemma" is avoided by the presence of a life sentence with parole, or whether it is avoided because the defendant could potentially receive a sentence of a definite term. The mechanism by which Petitioner could be released, either parole or expiration of a definite term, is irrelevant because release is inherent in either type of sentence, and the "false dilemma" of a future dangerousness argument only exists where the defendant will never be released. *See Ramdass*

v. Angelone, 120 S.Ct. 2113, 2135 (2000) ("If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . *will never be part of society again*." (Stevens, J., dissenting) (emphasis added); *Starnes*, 513 S.E.2d at 916 (unlike a sentence of life without parole, "a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society").

Indeed, release is *inevitable* with a definite term sentence, while only *possible* with parole. A definite term sentence is thus a stronger reason why the prohibited "false dilemma" is not created. Thus, if a definite term sentence of at least thirty years was a possibility for Petitioner under South Carolina's sentencing statute, then the *Simmons* false dilemma was not met, and the state law rule in *State v. Norris* properly controls. *Shafer*, 531 S.E.2d at 531 (citing *State v. Norris*, 328 S.E.2d 339 (S.C. 1985)).

D. Since it was impossible to predict at the time of the jury charge and closing argument that the jury would make the necessary findings to preclude the possibility of a definite term sentence, then life without parole was not the only available alternative sentence to death, and a *Simmons* instruction was not required.

The life without parole provisions in section 17-25-45 were not triggered in this case.[3] JA 225, 234-35. Thus,

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[3] Petitioner did have a prior conviction for criminal sexual conduct (CSC) with a minor 2nd, and non-violent burglary 2nd. JA 31-36. However, the solicitor never served notice that he sought sentencing under section 17-25-45; thus, even though a life without parole sentence is mandatory if the defendant has a one prior "most serious offense," such a sentence could not have been given to Shafer absent the appropriate statutory notice. S.C. Code Ann. 17-25-45(G) & (H) (Supp. 1998). Moreover, the CSC 2nd would be the only possible

depending on the findings of the jury on the sentencing phase, Petitioner faced three possible sentencing alternatives: 30 years, life without parole, or death. Since there was legally available to Petitioner a potential alternative sentence to death other than life without parole, the first prong of *Simmons* is not met.

Petitioner points out that the definite term sentence is a possibility only if the jury does not find an aggravator, and the jury has no sentencing role, and does not deliberate future dangerousness, unless it finds an aggravator. Of course, when the *Simmons* test is triggered, the required remedy is either a jury instruction or defense argument that a life sentence is without parole. *See Simmons*, 512 U.S. at 178 (O'Connor, J., concurring). Obviously, the time for determining the propriety of requested jury charges or closing argument *is at the time the charge or argument is to be given to the jury*. And, although it is true that if the jury finds an aggravating factor the possibility of the definite term sentence ceases to exist, juries in South Carolina receive all their sentencing phase instructions and argument at one time before retiring to deliberate on *both* the presence of aggravators and, if necessary, the proper punishment. Thus, it cannot be disputed that at the time the trial judge must decide on the propriety of charges and argument, there remains legally

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"most serious offense;" however, the statute excludes CSC 2nd with a minor where the act was consensual, and the testimony in the sentencing phase reflects that in fact the 12-year old girl consented to sex with Shafer. S.C. Code Ann. 17-25-45 (C)(1) (Supp. 1998). JA 38-40. The light sentence further indicates the judge found the sex was consensual. JA 70-72. Since 17-25-45 could not be invoked absent notice which was not given in this case, and since it does not appear that Shafer's CSC would qualify as a "most serious offense," then he had the possibility of a definite term sentence for murder if the jury did not find an aggravator.

available under state law a definite term sentence as an alternative to death and life without parole.[4]

The Fifth Circuit reached a similar conclusion in *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). There, co-defendant Juan Garza faced a capital trial in federal court for a number of murders related to drug trafficking. The evidence against Garza showed that he either contracted for or participated in the murders of three men. 63 F.3d at 1351-52. Garza requested the jury be instructed that life without parole was the only alternative sentence, but the trial court instead told the jury that, if the jury did not recommend death, the court could impose either life without parole or another sentence. 63 F.3d at 1367. Under 21 U.S.C. § 848(e), the court could sentence the defendant to "any term of imprisonment" from 20 years to life without

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[4] It is Petitioner, however, that takes statements in *Ramdass* out of context when he quotes the plurality's explanation of the holding of *Simmons*. *See* Brief for Petitioner p. 24 (stating: "Later, Justice Kennedy elaborated on this point, observing that under *Simmons*, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law.").

Justice Kennedy was merely describing *Simmons*'s applicability to a scheme where a life sentence carried the possibility of parole unless the defendant's prior record precluded parole. Justice Kennedy was not addressing a scheme like the one present in this case, where a mandatory minimum definite term sentence was a third option to life without parole and death. Under the South Carolina sentencing scheme at issue here, at the time of jury charge and argument the jury still has yet to make a factual finding beyond a reasonable doubt *about the crime itself* which would preclude the definite term sentence and make the defendant "death eligible". *See* S.C. Code Ann. § 16-3-20 (Supp. 1999). In contrast, under the Virginia scheme in *Ramdass*, the jury's guilt phase findings define the crime as capital, and in the sentencing phase future dangerousness is expressly submitted as an aggravator and already at issue at the time of the jury charge and closing argument. *See* Va. Code Ann. §§ 18.2-31 and 19.2-264.4 (Michie 1992). As such, Justice Kennedy's statements cannot be read in isolation to preclude the state's argument here.

parole, assuming the jury did not recommend death. In addition to some mitigators, Garza's jury found first-tier aggravators, second-tier aggravators, and non-statutory aggravators, including that Garza premeditated and planned the killings, that he participated in a contract killing, and that he was also responsible for five more killings. Flores, 63 F.3d at 1366-67.

Garza argued that *Simmons* was triggered because if the jury did not return a death sentence, the trial court would have had no choice but to impose life without parole. According to Garza, a comment in the Federal Sentencing Guidelines necessarily and expressly prevented the trial court from imposing a lower sentence than life without parole, because the jury found that the defendant intentionally killed his victims. Garza also argued that certain enumerated factors authorizing lower sentences in the Federal Sentencing Guidelines, were not present in his case. *Flores*, 63 F.3d at 1367-68.

In rejecting this argument, the *Flores* decision stated:

> However, assuming without deciding that the jury's findings of intentional killing would be binding on the sentencing judge and therefore prevent a downward departure, **the court could not predict before the jury begins its** [sentencing phase] **deliberation** whether it is going to find the necessary intent. Thus, when the attorneys make their final arguments in the penalty phase and **when the court gives its penalty instructions, no one would know whether life imprisonment would be the only permissible sentence**.

63 F.3d at 1368 (emphasis added). Moreover, the court also concluded that the general discretionary mitigator in the

Sentencing Guidelines at least remotely left the possibility that Garza could receive a lesser sentence. Thus, *Flores* rejected the *Simmons* claim because a life without parole sentence was not the only legal sentence Garza could have received. *Flores*, 63 F.3d at 1368.[5]

Just like *Flores*, at the time the attorneys gave their penalty phase arguments and the judge gave his penalty phase charge in Petitioner's case, no one could have conclusively predicted whether the jury would find a necessary aggravator. Therefore, it was impossible to know whether life without parole would be the only possible alternative sentence until after the jury's penalty phase verdict. If the jury had not found an aggravator, then Petitioner could have received a sentence as low as 30 years. Accordingly, he had a *legally available sentence* besides death and life without parole, and thus the *Simmons* test is not met.

In his brief, Petitioner attempts to distinguish *Flores* by pointing out that while under the South Carolina scheme the jury's finding of an aggravator creates a choice between death and life without parole, under the federal death penalty scheme at issue in *Flores*, the *court* could impose life without parole or some lesser sentence if the jury found sufficient aggravators, but failed to return a death sentence. *See* Brief of Petitioner p. 23

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[5] In *People v. Simpson*, 665 N.E.2d 1228 (Ill. 1996), the court also rejected a similar argument. The defendant on appeal claimed the trial judge erred by only instructing the jury that the court would impose some other sentence on the defendant if the jury did not return a death sentence. The *Simpson* court noted that an life without parole instruction would be required in a multiple murder situation where under statutory law life without parole would be the only alternative sentence. Thus, the court held *Simmons* inapplicable because the defendant, who only killed one person, was statutorily eligible for a sentence other than life without parole. 665 N.E.2d at 1244-45.

(discussing 21 U.S.C. § 848(k)). However, in *both* the South Carolina and federal schemes the court could impose a lesser sentence if the jury did not find the necessary aggravator. More importantly, *Flores assumed* that the jury's finding of the intent aggravator would preclude any other alternative sentence to death other than life without parole, but still reasoned that the *Simmons* test was not met because no one could conclusively predict at the time of the closing arguments and jury charges whether the jury would find the necessary intent aggravator. *Flores*, 63 F.3d at 1368. Thus, for purposes of the reasoning in *Flores*, the two schemes were essentially identical, and the case is not distinguishable.

E. *Simmons* does not require trial judges in South Carolina to gauge the probability of future events in determining whether life without parole is the only available alternative sentence.

In *Ramdass v. Angelone*, this Court rejected application of a "functional" approach to the *Simmons* test, in a situation where the defendant had received a guilty verdict for a life without parole-qualifying prior offense, but there had not been an entry of judgment as required by state law. *Ramdass v. Angelone*, 120 S.Ct. 2113, 2117-20 (2000). Both the plurality and concurring opinions in *Ramdass* found it neither "necessary [n]or workable" for trial courts to "evaluate the probability of future events" in order to determine whether the Simmons test was met. *Ramdass*, 120 S.Ct. at 2121, 2127-28.

Similarly, in this case a trial court would have to evaluate the future likelihood that the jury would find an aggravator beyond a reasonable doubt. Even though the jury only chooses between life without parole or death if it finds an aggravator, the jury's findings still ultimately drive which one of the three

sentencing options is available to the defendant. In South Carolina, when the murder defendant seeks a jury trial, the jurors decide whether aggravating factors are present. *State v. Smith*, 298 S.C. 482, 381 S.E.2d 724 (1989) ("In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight."); *State v. Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986) ("The trial judge must submit to the jury those aggravating circumstances are supported by the evidence.").[6] Petitioner asked for and got his jury trial; it is speculative and would make the jury's role in determining aggravating factors irrelevant to contend that at the time of the charge only death and life without parole were available. *See State v. Starnes*, 531 S.E.2d 907 (S.C. 2000) ("inappropriate" to assume jury will necessarily find existence of an aggravator beyond a reasonable doubt).

Admittedly, Petitioner's counsel did argue to the jury that "you're going to find a statutory aggravator." JA 197-98. However, Petitioner did not concede the aggravator as a matter of law. Instead, the jury was instructed of its duty to find an aggravator beyond a reasonable doubt and that it should stop further deliberation if it failed to so find. JA 202, 206, 210-12. Thus, like *Flores*, at the time the judge charged the jury, the definite term sentence was still a possibility, and life without parole was not the only legally available alternative sentence to death. *Cf. also State v. Mitts*, 690 N.E.2d 522, 528-29 (Ohio 1998) (rejecting *Simmons* argument that trial judge erred in failing to answer jury's question whether two life sentences would be served consecutively, and noting, "[defense] counsel's

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[6] *See also* S.C. Code Ann. § 16-3-20(B) (Supp. 1997) ("The [sentencing] proceeding must be conducted by the trial judge before the trial jury . . . . If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge.").

argument that it was unrealistic to think that the trial judge would impose concurrent sentences here is speculative.").

Moreover, *Simmons* is not triggered when the defendant's entitlement to a third sentencing alternative depends on resolution of a matter of fact. In *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994), *cert. denied*, 489 U.S. 1040 (1989) the court rejected a *Simmons* claim from a defendant who was technically eligible for parole. The defendant claimed error in (1) the failure of the trial court to admit expert testimony that a Texas parole board "almost certainly" would consider the defendant ineligible for parole, and (2) the judge's failure to so charge the jury. *Scott* reasoned that *Simmons* requires that the defendant's parole ineligibility turn on a matter of law, NOT a matter of fact. Thus, the court concluded:

> A capital defendant's parole ineligibility must be a matter of law because evidence of such ineligibility is inherently "truthful" . . . . **But if a defendant's parole ineligibility is a matter of fact, i.e. the defendant probably will not be eligible for parole, then the evidence is purely speculative** (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness.

Scott, 41 F.3d at 21-22 (emphasis added). Just like *Scott*, where the defendant's parole ineligibility depended on a parole board's determination of fact at some point in the future, here, whether Petitioner was eligible for a mandatory minimum 30-year sentence depended on his jury's resolution of a matter of fact. Thus, *Simmons* is inapplicable.

Unlike the *Ramdass* plurality, concurrence, and dissent's disagreement over the effect of entry of judgment under Virginia law, certainly a jury's duty to make factual findings of an

aggravator beyond a reasonable doubt can hardly be termed to be "ministerial" or "inevitable and foreordained". *Ramdass*, 120 S.Ct. at 2123, 2127. As such, the *Simmons* test is not met. As such, and like *Ramdass*, Petitioner has not "conclusively established" that life without parole was the only available alternative sentence to death at the time the judge had to determine the appropriate charges to give. *Ramdass*, 120 S.Ct. at 2120. *Simmons* is not triggered.

Of course, the practical effect of such a rule is that solicitors may argue future dangerousness without the necessity of a life without parole charge, unless the qualifying "serious offenses" or "most serious offenses" trigger life without parole under South Carolina Code section 17-25-45. Petitioner contends that the South Carolina Supreme Court has ruled *Simmons* inapplicable to its sentencing scheme. However, the state court's result is no different than what existed under the old South Carolina scheme, as even under the statutory scheme in *Simmons* itself solicitors could argue future dangerousness without a life without parole charge, unless the defendant had a prior "violent crime" making him ineligible for parole under South Carolina Code section 24-21-640. In this case, *Simmons* is inapplicable unless the defendant's prior record qualifies him for life without parole under section 17-25-45. In both the *Simmons* situation and the present situation, it is the defendant's prior record that drives the applicability of *Simmons*, and there is no material difference between the situations.

F. The South Carolina Supreme Court had "good reason" not to extend *Simmons* beyond the circumstances of that case.

As noted before, subject to the due process rule of *Simmons*, states retain "some discretion in determining the extent to which a sentencing jury should be advised of probable future

custody and parole status in a future dangerousness case". *Ramdass v. Angelone*, 120 S.Ct. 2113, 2119 & 2121 (2000). South Carolina has long held that parole eligibility or ineligibility are not proper considerations for a capital sentencing jury. *Shafer*, 531 S.E.2d at 532.

Petitioner seeks to create within the jurors a sort of reverse-*Simmons* "false sense of security," that if they fail to return a death sentence, life without parole will be imposed. This is inaccurate, unfair to the state, and not constitutionally required.[7] *See Ramdass v. Angelone*, 120 S.Ct. 2113, 2120 (2000) ("In this case, a *Simmons* instruction would not have been accurate under the law."); *Simmons*, 512 U.S. at 161-62 ("grievous misperception [about life without parole] was encouraged by the trial court's refusal to provide *accurate information* regarding petitioner's parole eligibility) (emphasis added); *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (*Eighth* Amendment requires provision of "accurate" sentencing information); *State v. Shafer*, 531 S.E.2d 524, 531 (S.C. 2000) ("Informing the jury that appellant was parole ineligible when, unbeknownst to the jury, he faced a possible sentence of thirty years imprisonment after which he would be unconditionally released would not have fairly responded to the jury's inquiry.").

Indeed, common sense dictates that when juries inquire about parole, they are really asking for assurance that the defendant will never get out of prison again for any reason. Juries mention the word "parole", because that is the concept of early release that is familiar to the layperson. However, even a defendant sentenced to life without parole under South Carolina's murder statute could still benefit from pardon or clemency. *See* S.C. Code Ann §§ 24-21-920 to -1000 (1977 & Supp. 1999).

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[7] Further, defense counsel conceded at trial that "juries from May 30th, 1996 have three options in the state of South Carolina." JA 234.

Moreover, as the plurality noted in *Ramdass*, a parole ineligibility charge is of "uncertain materiality", and can be overcome if a jury concludes the defendant may escape, be pardoned, benefit from a change in state laws, or be dangerous to society in prison. *Ramdass*, 120 S.Ct. at 2122. Thus, only answering a jury's "parole" question leaves the false impression that the defendant will never get out of prison, when in fact many mechanisms and contingencies still exist for release.

Because of this, a state can legitimately decide to avoid these other forms of release and future dangerousness for the extraneous and collateral litigation they bring to a capital sentencing proceeding, while also deciding, subject to the limited rule of *Simmons*, to avoid the false impression that a strict life without parole answer alone provides. *See generally Ramdass*, 120 S.Ct. at 2121-22 (plurality opinion) (if the inquiry includes whether the defendant may be released at some point from prison, even the age or health of the prisoner may be relevant, and a state "might well conclude that the jury would be distracted from the other vital issues in the case").

By the same token, practical problems would justify the decision not to charge the jurors that if they fail to find an aggravator, the judge will sentence the defendant anywhere from thirty years to life without parole, but if they do find an aggravator, the defendant faces either death or life without parole. Such a charge could potentially create a "reverse-*Caldwell*"[8] diminishment of the jurors' sense of sentencing responsibility, in that they would be aware they could do nothing and sentencing would be handled by the judge. *Cf. generally Jones v. United States*, 527 U.S. 373, 384 (1999) (in *Eighth Amendment* context, noting that although it would be accurate to charge the jury that deadlock will result in sentencing by the judge, that information

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[8] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

would be withheld because it was "an open invitation for the jury to avoid its sentencing responsibility and to disagree") (quoting *Justus v. Virginia*, 266 S.E.2d 87 (1980)). If the trial judge was to advise the jury on the likely sentence he would give if the jury did not return an aggravator, that would effectively create a "third choice" violative of the South Carolina legislature's "either/or" sentencing scheme. *See State v. Norris*, 328 S.E.2d 339 (S.C. 1985). *Cf. Jones*, 527 U.S. 373 (instruction on effect of jury deadlock might undermine governmental interest in decision between life or death).

Because evidence of parole ineligibility is of "uncertain materiality", and because of the potential of practical problems and collateral litigation in charging a jury under the new sentencing scheme, the South Carolina Supreme Court had "good reason" not to extend *Simmons* beyond the circumstances of that case.

II. *Simmons* was satisfied by defense argument and the judge's "until death of the offender" charge.

Even if this Court finds *Simmons* was triggered, the defense's closing argument and the judge's charge fulfilled the requirements of *Simmons*.

Simmons stated that its mandate would be satisfied if information about the defendant's parole ineligibility is presented to the jury through *either* an instruction from the court or argument of defense counsel. 512 U.S. at 169, 177.[9]

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[9] In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *overruled on the grounds in State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), the South Carolina Supreme Court held that trial courts had to give life without parole instructions if the *Simmons* 2-prong test was met and the defendant requested such an instruction. However, the issue before this Court in the present case concerns only the federal constitutional mandate in *Simmons*, and not any purely state law expansion of the rule.

In his sentencing phase closing, Petitioner repeatedly made "pine box" arguments that he would never leave prison if he received a life sentence. JA 192, 194, 196, 198-99. *See generally State v. Loftin*, 680 A.2d 677 (N.J. 1996) (argument that defendant will die in jail would satisfy *Simmons*).

As stated above, the jury was apprised by the defense in argument the following:

> "we know that it ended in a way that Wesley Shafer is going to die in prison. The question is will the state executed him *or will he just die in prison*...
>
> ...Wesley Shafer is leaving prison in a pine box..,We just ask that he be able *to spend his natural life there*....

JA 192.

> ...putting a 19 year old in prison *until he is dead*...
>
> ...and you can put him someplace *until he is dead*, where he will have the opportunity every single day to think about what he has done. Life in prison *until death*.

JA 194.

> ...Wesley Shafer is going to prison and *stay there*....

JA 196.

> ...make him go to prison with men *for the rest of his life until he dies* or whether you sentence him to death. Its just a matter of *where he dies*.
>
> ...I'm asking for the small amount of mercy it takes to make a 19 year old die in prison... When they say give him life, *he's not going home*... a child spend the rest of his life in prison.
>
> ...Is there anyone among us who wants to spend the rest of his life in prison?...send a 19 year old to prison *for the rest of his life*....

JA. 198-199.

In its instructions, the trial judge initially emphasized that "life imprisonment means until the death of the defendant." JA 201. The judge repeated this concept of imprisonment until death throughout his instructions. JA 214 ("imprisoned in the state penitentiary for the balance of his natural life.")

Further, when the jury made its inquiry about whether there was a "remote chance that someone who was convicted of murder could become eligible for parole" and "under what conditions would someone convicted of murder be eligible?", the trial court answered the inquiry in the following direct manner:

> ...Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge.
>
> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, quote, for the purposes of this section *life imprisonment means until the death of the offender*, end quote.

> Parole eligibility or ineligibility is not for your consideration.

JA 239-240.

In *Simmons*, the Court found that "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning" was insufficient to satisfy that requirement. Here, however, the imprecise "a plain and ordinary meaning instruction" was not given as in Simmons. Instead, the concept of early release was removed from the jury's consideration by the judicial definition that "*life imprisonment means until the death of the offender*." The "until death" concept was ameliorated by its forceful restatement upon the jury's questions as well as by the uncontested defense arguments that he will die in prison.

In *Weeks v. Angelone*, 528 U.S. 225, 120 S.Ct. 727, 733 (2000), this Court reiterated that "a jury is presumed to follow its instructions", citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Further, the Court recognized that "a jury is presumed to understand a judge's answer to its question." Id.

Here, the jury was told two things in response to its parole inquiry. First, it was told that a life sentence meant imprisonment until death. Second, it was told it *could* not consider parole eligibility *or ineligibility* in making its decision. The jury must be presumed to have understood the plain language of "until death of the offender" which removes early release. Third, in response to its inquiry about factors or conditions for parole, the judicial direction that it "is not for your consideration" resolved those concerns.

As in *Weeks*, this jury must be presumed to have followed the instructions of the trial judge. In doing so, the jury necessarily

would have understood that its sentence for life imprisonment meant he would be in prison until he dies. The due process concerns of *Simmons* were satisfied in this case where the defective "plain and ordinary meaning" instruction was not given. Given that the jury was adequately instructed that he would be in prison until his death and given that the trial judge's response directed the jury's attention to its earlier adequate instruction and remove parole from its consideration, the Constitution does not require more. The jury was not faced with the "false dilemma" condemned by *Simmons*. 512 U.S. at 171.

III. The prosecution did not argue future dangerousness; thus, the rule in Simmons was not triggered.

As noted before, the *Simmons* test requires that both prongs be present for its rule to attach. Thus, if the solicitor did not argue future dangerousness, a *Simmons* charge is not necessary. The trial judge repeatedly found that future dangerousness was not an issue in this case. JA 164, 188-89, 191-92.

As an initial matter, Petitioner seems to challenge the premise that future dangerousness argument by the prosecution, or at least some express reliance on future dangerousness by the prosecution, is necessary to satisfy first prong of the *Simmons* test. Such a view is as odds with this Court's expression of the *Simmons* rule. *See Ramdass*, 120 S.Ct. at 2117 (plurality opinion) (state submitted to the jury a future dangerousness aggravating circumstance); 120 S.Ct. at 2126 (concurring opinion) (noting that the state must seek "to demonstrate that the defendant poses a future danger to society"); 120 S.Ct. at 2135 (dissenting opinion) (stating: "If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . will never be part of society again."). *See also Simmons*, 512 U.S. at 162 ("grievous misperception" encouraged by "state's repeated suggestion that petitioner would pose a future danger to society); 512 U.S. at 163 (prosecutors in South Carolina often emphasize a defendant's future dangerousness in their evidence and argument, and they urge the jury to sentence the defendant to death so he will not be a danger to the public if released); 512 U.S. at 168-69 ("If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .").

If Petitioner is correct that the state raises future dangerousness by merely introducing evidence in the sentencing phase about a murder defendant's past criminal conduct and bad acts, then the first prong of *Simmons* would be superfluous and *Simmons* would apply to every capital case where the only alternative sentence to death was life without parole. Justice O'Connor flatly rejected such a view in *Simmons*:

> Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death" is life without parole.

512 U.S. at 175 (O'Connor, J., concurring). Similarly, the *Simmons* plurality also implied that character, prior criminal history, and background are not the same thing as future dangerousness. 512 U.S. at 164 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing punishment." (Emphasis added)).

Further, both the *Simmons* plurality and Justice O'Connor in concurrence recognized that the state could legitimately argue

that the defendant would be a future danger to other inmates and prison staff, without triggering the rule in *Simmons*. 512 U.S. at 165 n. 5; 512 U.S. at 177. Clearly, it is the use to which the prosecution puts the evidence which triggers the rule in *Simmons*.[10]

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[10] In *Ramdass*, the plurality addressed various polls submitted to the Court under the guise of citing law review articles. The plurality rejected consideration of the polls, reasoning that: (1) citation of a law review does not suffice to prove the truth of the hearsay, (2) the creators of the poll did not take the stand in the defendant's case (where they would have been subject to cross-examination on the validity of their methodology and conclusions), (3) the polls were limited in scope, and (4) the polls were conducted by an organization that sought to avoid death sentences. Ultimately, the court noted that the Virginia Supreme Court was "not required to consult opinion polls". Ramdass,120 S.Ct. at 2123-24.

Many of the same deficiencies are inherent in the polls cited in the brief of *amicus curiae* The Cornell Death Penalty Project to support the notion that jurors are confused about length of sentence and always consider future dangerousness. The Cornell Death Penalty Project, which "conduct[ed] empirical analyses of juror decision making in capital cases as a participant in the multi-state Capital Jury Project (CJP)", Brief of *Amicus Curiae* p. 1, is a resource for capital defense attorneys, and its members often represent capital defendants in South Carolina.

Moreover, the tables included at the end of the *amicus curiae* brief reflect sampling of only some 50+ jurors from South Carolina. Similarly, the law review article upon which the *amicus* brief primarily relies reflects difficulties with the methodology. *See* Brief of *amicus curiae* (discussing Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999). For example, the article notes that the CJP examined only four jurors from a mere twenty to thirty capital trials in each state. *See* Bowers & Steiner, *supra*, at 643-44. Moreover: (1) juror interviewers exercised "discretion" to conduct additional interviews of jurors where the initial interviews "raised questions"; (2) in two states more than four jurors were contacted from trial because the minimum sample of trials could not be met; and (3) "the target sample of four jurors per case was not always met due to difficulties in applying the sampling and replacement protocol, locating jurors whose addresses and phone numbers were changed or were not initially correct or sufficiently detailed, and the

Other jurisdictions have reached similar conclusions. *See State v. Bey*, 736 A.2d 469 (N.J. 1999) ("prior murder" aggravator did not raise future dangerousness); *State v. Bey*, 709 N.E.2d 484 (Ohio 1999) (prosecutor did not raise future dangerousness by reviewing evidence of defendant's character, background, and history in response to adaptability evidence); *Commonwealth v. May*, 710 A.2d 44, 47 (Pa. 1998) (evidence of prior criminal conduct does not necessarily raise future dangerousness). Indeed, there are many types of evidence known to law which are admitted for one purpose but not another. *See, e.g.* Rule 404(b), SCRE.

In this case, unlike *Ramdass*, future dangerousness was not submitted to the jury as a statutory aggravator. Unlike

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unwillingness of some jurors to be interviewed. *See* Bowers & Steiner, *supra*, at 644 n. 189.

The accuracy of the polls from South Carolina are further called into question because for about four years, jurors in South Carolina were told about the defendant's 20- or 30- parole eligibility from a life sentence under the old sentencing scheme. *See State v. Atkins*, 360 S.E.2d 302 (S.C. 1987); *State v. Torrence*, 405 S.E.2d 315 (S.C. 1991). Further, prior to the *Simmons* decision in June 1994, prosecutors in South Carolina *could* (and did) argue and raise future dangerousness without being concerned with *Simmons* issues. Also, under the old sentencing scheme, prosecutors could argue future dangerousness without the need for a *Simmons* instruction if in fact the defendant was parole eligible. *See, e.g. State v. Simpson*, 479 S.E.2d 57 (1997). Finally, many prosecutors in South Carolina choose to expressly raise future dangerousness and accept a life without parole instruction. Obviously, there are many capital trials in South Carolina where future dangerousness was expressly raised and/or parole eligibility or ineligibility instructions were given.

It is thus not surprising that South Carolina jurors from unnamed trials in the CJP data would have a parole eligible concept of a life sentence, or would remember future dangerousness arguments or deliberations. The polls simply do not separate out the varying situations to get an accurate assessment of how jurors react to trials such as Petitioner's.

Simmons, the prosecution did call any mental health experts to testify that Petitioner would likely be dangerous in the future. Despite this, Petitioner points to a number of factors from which he asserts the state raised the issue of future dangerousness.

First, Petitioner argues that the boilerplate language in the state's Notice of Evidence in Aggravation of the Punishment raises future dangerousness. Even if true, it is irrelevant; no "false dilemma" in violation of *Simmons* can arise from assertions in a document which is never before the jury. *Cf. Simmons*, 512 U.S. at 171.

Next, Petitioner argues that the evidence that he had been involved in an incident where he and others engaged in sexual conduct with two 12-year-old girls, evidence of his drug use, subsequent arrests, and failure to report while on probation, and evidence that Petitioner got into an altercation with a jail employee, raised the issue of future dangerousness. The South Carolina Supreme Court has rejected similar claims. In *State v. Young*, 319 S.C. 33, 459 S.E.2d 84 (1994), the court rejected a *Simmons* claim by noting that future dangerousness was not an issue. In doing so, the *Young* stated:

> Evidence was presented concerning Young's character and his prior criminal record. Such evidence was, however, relevant in the sentencing phase without regard to future dangerousness. *Simmons v. South Carolina.* There was no contention that Young would one day be released from prison. In fact, counsel for Young stressed to the jury that Young would never be released.

319 S.C. at 39 n. 4, 459 S.E.2d at 87 n. 4. *See also State v. Williams*, 468 S.E.2d 626, 321 S.C. 327 (1996).

In this case, the state introduced evidence about Petitioner's past conduct and prior criminal record. While the solicitor generically referred once to the jury's right to consider Petitioner's character, JA 179, he ***never once*** referred to any of Petitioner's past conduct or criminal record during his argument. The state was entitled to produce evidence of Petitioner's past criminal conduct without triggering *Simmons*, where it never expressly raised to the jury that Petitioner should be sentenced to death because he might be a danger in the future.[11]

With regard to evidence that Petitioner was at risk for explosive outbursts of aggression and drug use, this was evidence that *the defense* introduced at trial. JA 99-107; R. 1711. Even assuming this mental health evidence necessarily went to future dangerousness, the prosecution never introduced nor "used" this evidence, and it certainly cannot be said to have put something into issue by the defense's decision to introduce the evidence. *Simmons*, 512 U.S. at 168-69 ("If *the State rests* its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .") (emphasis added).

Petitioner contends the solicitor did in fact argue future dangerousness when he stated:

> Ladies and Gentlemen, one of the scariest things, certainly the crime, certainly the video, but one of the scariest things I think about that second video, the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying "Oh, God; Oh, God; Ray, Ray" and the

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[11] Moreover, as noted before, both the *Simmons* plurality and Justice O'Connor's concurrence stated that "inside prison" evidence does not trigger *Simmons*.

girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says "Come on, Jamie, they might come back, they might come back".

Ladies and Gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the State. So that the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, and they might come back, they might come back, they will remember this day, and they will remember this jury, and they will remember this verdict.

JA 185-86. Petitioner contends the reference to "they might come back" raises future dangerousness. The first time the solicitor referred to the phrase, he was describing the evidence. The second time is clearly part of a general deterrence argument, not a future dangerousness argument. The "they" in the second paragraph obviously refers to "the next time somebody thinks about loading up" and coming to Union County, not Petitioner specifically.

It is elementary that a future dangerousness argument is a specific deterrence argument. *See, e.g. Coleman v. Brown*, 802 F.2d 1227 (10th Cir. 1986) (future dangerousness is relevant to specific deterrence); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (future dangerousness is relevant to specific deterrence); *State v. Rose*, 451 S.E.2d 211 (N.C. 1994) (future dangerousness

is a specific deterrence argument). There is a distinction between specific deterrence and general deterrence arguments. *State v. Simmons*, 310 S.C. 439, 445, 427 S.E.2d 175, 179 (1993), *rev'd on other grounds*, 512 U.S. 154 (1994). Thus, a general deterrence argument does not raise future dangerousness.

Moreover, the arguments Petitioner points to in *Simmons* which were held to raise future dangerousness also only sought specific deterrence against the particular defendant. In *Simmons*, the prosecutor told the jury its role was to decide "what to do with [petitioner] now that he is in our midst". The prosecutor also stated: "Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." 512 U.S. at 176. The "someone" in *Simmons* was that particular defendant, not some hypothetical future defendant as argued in this case.

The state was entitled to introduce Petitioner's past conduct and prior record without raising future dangerousness. Since the solicitor only argued general deterrence, and never in fact referred to any of Petitioner's prior record, the state never put future dangerousness into issue. Accordingly, *Simmons* is not triggered, and the sentence should be affirmed.

CONCLUSION

Because life without parole was not the only available alternative sentence to death, the South Carolina Supreme Court correctly ruled that *Simmons* was not triggered, and Petitioner's sentence should be upheld. If this Court decides to reverse that ruling, Respondent requests that the case be remanded to the South Carolina Supreme Court to address Respondent's argument that other forms or possibilities of early release should be charged or argued whenever a life without parole instruction is given.

In the event this Court decides to reverse on the South Carolina Supreme Court's "only available alternative sentence" ruling, *Simmons* was still satisfied by the jury charge and defense argument, and Petitioner's sentence should be upheld.

In the alternative, Respondent requests a remand to the South Carolina Supreme Court to address whether the prosecution triggered *Simmons* by raising future dangerousness. Otherwise, this Court should affirm Petitioner's sentence because the prosecution did not put future dangerousness at issue in Petitioner's trial.

Respectfully submitted,

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